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5 **IN THE SUPREME COURT**
6 **STATE OF ARIZONA**

7 IN THE MATTER OF:

Supreme Court No. R-10-0031

8 PETITION TO AMEND ER 8.4,
9 RULE 42, ARIZONA RULES OF
10 THE SUPREME COURT

**Comment to Petition to Amend ER 8.4,
Rule 42, Arizona Rules of the Supreme
Court**

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13 The undersigned attorney hereby comments to the Petition to Amend ER
14 8.4, Rule 42, Arizona Rules of the Supreme Court. The State Bar of Arizona has
15 petitioned this Court to amend ER 8.4, Rule 42, Arizona Rules of the Supreme
16 Court, by adding the following language: "It is professional misconduct for a
17 lawyer to knowingly manifest bias or prejudice based upon race, gender, religion,
18 national origin, disability, age, sexual orientation, gender identity or expression,
19 or socioeconomic status in the course of representing a client when such actions
20 are prejudicial to the administration of justice; provided, however, this does not
21 preclude legitimate advocacy when such classification is an issue in the
22 proceeding."

23 Undersigned counsel opposes this proposed revision to amend ER 8.4, Rule
24 42 as it is unnecessary, problematic and would invite complaints difficult to
25 properly defend given the nature of the subject matter. Further it would appear
26 that any legitimate complaints of bias and prejudice would be already covered by

1 the existing rule as would relate to the administration of justice. Finally I am
2 concerned that the Bar is being manipulated by a group of individuals who have a
3 far different agenda than insuring a professional bar. For example, it would appear
4 that efforts such as this to add sexual orientation have at their root an attempt to
5 change the age old appreciation of what many consider as to what conduct is
6 proper and what is not. This is not a simple matter of respecting the right of the
7 individual. It is a matter of someone attempting to force acceptance of certain
8 behavior which historically has fallen outside that of customs and mores. In
9 addition the State Bar has better things to be doing with its time and energy than
10 advancing the political agenda of a particular group. Indeed someone may accuse
11 me of harboring a bias or prejudice simply because I have written to oppose this
12 effort.

13 Then there is the whole question of whose bias or prejudice are we
14 considering and in what context. Will an attorney be subject to a complaint if he
15 or she runs afoul of a client's conclusion that because he or she "lost" the case, it
16 was due to some alleged deep seeded bias, be it religion, sexual orientation or
17 race? Could such a threat then be made to the attorney in order to gain leverage in
18 a fee dispute? Then there is the situation of a client who may be struggling with a
19 moral question and seeks the attorney's opinion on the subject. What happens if
20 the honest conversation is viewed with hostility by the client? The attorney could
21 have no bias toward his client, conducted himself appropriately, acted with total
22 professionalism and still be subject to an unwarranted accusation.

23 Certainly a lot of this is speculation as to possible scenarios. But isn't this
24 exactly what lawyers do? We speculate as to the law of unintended consequences.
25 It is my opinion that the current rules more than adequately assist the State Bar in
26 addressing any issues that may come before it in this regard. We do not need to be

1 changing rules every time members of a group seem to think that they are not
2 being adequately protected. The possibility of misuse is always there. This Court
3 and the State Bar should not create a situation that can be used to advance a
4 particular political agenda or create the potential for problems.

5 The subjective nature of the proposed language also would have a chilling
6 effect on an attorney's rights as protected by the First Amendment to the U.S.
7 Constitution and Article 2, Sections 4, 5, 6 and 12 of the Arizona State
8 Constitution. Attorneys have a special calling to defend those on the margin of
9 society. In many cases those who oppose such representation could make
10 unfounded but politically charged allegations that would affect the lawyer's
11 decision to represent such parties in the future. None of this would bode well for
12 the important role that attorneys have in the administration of justice to insure that
13 all have proper representation before the courts.

14 I could go on with more examples but I think my point is simply this. We
15 do not need to change the rule. This attempt to add this language is rife with
16 serious problems. Adding such language would have a chilling effect on the
17 exercise of various constitutional rights by advocates and also create an
18 atmosphere of intimidation given the broad and vague language of the proposed
19 change.

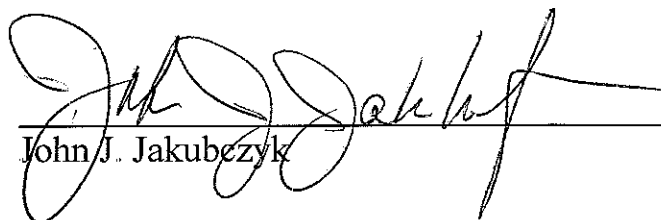
20 CONCLUSION

21 For the foregoing reasons, the undersigned attorney opposes the State Bar's
22 proposed amendment to the Arizona Rules of the Supreme Court.
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1 RESPECTFULLY submitted this 1st day of November, 2011.

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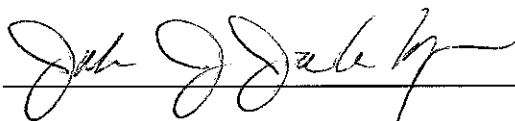
7 Electronic copy filed with the Clerk
8 of the Supreme Court of Arizona
9 this 1st day of November, 2011,

10 with a copy mailed to:

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